

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Tony Hammond

Section 407 Proceeding

Docket No. IM2016-1

ORDER GRANTING, IN PART, REQUEST FOR DATA AND EXPLANATIONS

(Issued July 14, 2016)

I INTRODUCTION

On June 16, 2016, the Federal Express Corporation (FedEx) filed a motion requesting certain data, explanations, and documents in this docket.¹ For the reasons discussed below, the Commission grants the Motion in part.

II BACKGROUND

On April 1, 2016, the Secretary of State requested the Commission's views on whether proposals for the 26th Congress of the Universal Postal Union (UPU) that amend rates or classifications for market dominant products are consistent with the standards and criteria for modern rate regulation established by the Commission under

¹ Motion of Federal Express Corporation Requesting Appropriate Data and Explanations, June 16, 2016, at 1-2 (Motion).

39 U.S.C. § 3622.² Pursuant to 39 U.S.C. § 407(c)(1) and 39 C.F.R. part 3017, the Commission established Docket No. IM2016-1 for the purpose of developing its views on the matters referred to in State's Request.³

On June 16, 2016, FedEx filed a motion requesting the Commission provide or require disclosure of "appropriate data, explanations, and documents" that FedEx believes are necessary for interested persons to comment in this docket. Motion at 1-2. Specifically, FedEx requests that the Commission disclose or require disclosure of three types of information. First, FedEx requests "high-level summaries" of the inbound and outbound "volume, cost, and revenue data for each proposed rate schedule or sub-schedule." *Id.* at 6-8. The referenced rate schedule and sub-schedule reflect the UPU terminal dues proposals.⁴ Second, drawing a parallel to non-UPU market dominant rate adjustments, FedEx requests that the Postal Service or the Department of State be required to act as the proponent of the terminal dues proposals and submit an explanation of "how the planned rate adjustments are designed to help achieve the objectives listed in 39 U.S.C. [§] 3622(b) and properly take into account the factors listed in 39 U.S.C. [§] 3622(c)." *Id.* at 8. Third, FedEx requests that the Commission add five UPU documents (Proposal 1, Document 15, Document 40, Article 12, and Proposal 20.12.91) and "any other proposals defining rates and classifications for market dominant products" to the docket. *Id.* at 9-10.

In its Motion, FedEx states that the requested data, explanations, and documents are similar to what the Commission requires with "every proposal to adjust rates for market dominant products." *Id.* at 2. Additionally, FedEx asserts that when commenting on whether proposed terminal dues rates are consistent with section 3622,

² See Letter from Nerissa J. Cook, Deputy Assistant Secretary, U.S. Department of State, Bureau of International Organization Affairs, on behalf of the Secretary of State, April 1, 2016 (State's Request). See *also* Letter from Acting Chairman Robert G. Taub, Postal Regulatory Commission, on behalf of the Commission, April 14, 2016.

³ Order No. 3253, Notice and Order Establishing Section 407 Proceeding, April 20, 2016, at 2.

⁴ Terminal dues are the rates paid between designated postal operators for the processing and delivery of letters, flats, and small packets weighing up to 4.4 pounds.

“affected parties need the same transparency of relevant data and explanations as provided in proceedings for evaluating the rates for other market dominant products.” *Id.* at 4. FedEx suggests that the Commission’s section 407 views are a “regulatory determination” and that failure by the Commission to provide such data before transmitting its section 407 views to the Secretary of State “may fall short of due process of law.” *Id.*

On June 23, 2016, the Postal Service filed an answer opposing FedEx’s Motion and asserting that FedEx’s requests are contrary to the Commission’s rules and prior orders.⁵ Specifically, the Postal Service notes that the Commission’s recently adopted procedural rules governing the development of the Commission’s section 407 views neither provide interested persons with discovery nor contemplate that these dockets would be used for fact-finding purposes. Answer at 3-4. The Postal Service asserts that, unlike the Commission’s Annual Compliance Determination (ACD) proceeding in which the Postal Service is required to prepare and submit detailed data that demonstrates that all products complied with title 39, the Postal Service has no obligation to submit specific data in this docket. *Id.* at 6. Additionally, the Postal Service states that FedEx’s specific demands for Inbound and Outbound Letter Post mail data are unreasonable because much of the requested data is non-public and commercially sensitive and public release could cause “commercial injury to the Postal Service.” *Id.* at 4-5. In response to FedEx’s characterization of such data as “high-level aggregations,” the Postal Service asserts that the specific data requested by FedEx is not “high-level” and that “[h]igh-level aggregations of such data are already publicly available.” *Id.* at 5.

The Postal Service also asserts that compelling the Postal Service to submit a discussion on how the terminal dues proposals are consistent with the objectives and factors in section 3622 conflicts with a prior Commission order. *Id.* at 7-8. Specifically, the Postal Service states that in Docket No. RM2015-14, the Commission considered

⁵ Answer of United States Postal Service in Opposition to Motion of Federal Express Corporation, June 23, 2016 (Answer).

and decided against two rounds of comments whereby commenters could respond to other commenters' positions.⁶ The Postal Service notes that the Commission held that the "purpose of a part 3017 docket is not to facilitate an adversarial proceeding, but rather to provide an opportunity for commenters to provide input on how the [section 407] views should be developed." *Id.*

III NATURE OF DOCKET NO. IM2016-1

Positions of the parties. In its Motion, FedEx asserts that the requested data and explanations are "similar to those that accompany every proposal to adjust rates for market dominant products" and likens this docket to the ACD proceeding or proceedings that evaluate domestic market dominant rates or classifications. Motion at 2, 4. FedEx suggests that the Commission's views are a "regulatory determination" and that such data and explanations should be available to ensure due process. *Id.* at 4.

In response, the Postal Service states that there is no basis in the Commission's rules for fact-finding in this docket and highlights the differences between this docket and adversarial proceedings, such as those concerning domestic market dominant rates and classifications and the ACD. Answer at 3, 6. Accordingly, the Postal Service asserts that when the Commission adopted procedural rules for its views, it neither provided interested persons with discovery nor contemplated that such dockets would be used for fact-finding purposes "as if this were an adversarial proceeding." *Id.* at 4.

Commission analysis. When adopting the procedural rules for development of its views, the Commission distinguished dockets under section 407 from proceedings that establish rates and classifications for domestic market dominant products and to which the Administrative Procedure Act's (APA's) notice and comment requirements apply. See Order No. 2960 at 11. The Commission stated that "the plain language of

⁶ *Id.* at 8; *citing* Docket No. RM2015-14, Order Adopting Final Rules on Procedures Related to Commission Views, December 30, 2015, at 27-28 (Order No. 2960).

39 U.S.C. [§] 407 makes clear that Commission views are an interagency advisory communication prepared at the request, and for the sole consideration of, the Secretary of State prior to his/her conclusion of treaties, conventions, or amendments addressing certain international postal rates and classifications.” *Id.* at 10. Specifically, the Commission described the number of steps between the Commission’s transmittal of its views to the Secretary of State and the final international rates and classifications adopted by the UPU and signed by the President, and found that the views’ distance from the final rates and classifications confirm their advisory nature.⁷

In Order No. 2960, the Commission also distinguished its views from domestic rate and classification proceedings, observing that domestic rate and classification proceedings are not purely advisory in nature and are not intended for the sole consideration of the Secretary of State. *Id.* at 11. The Commission stated the fact that the Secretary of State exercises the primary authority for the conduct of foreign policy with respect to international postal and delivery services further distinguishes procedures related to the Commission’s views under section 407 from domestic market dominant rate and classification proceedings. *Id.* Because the Commission’s views are advisory interagency communication that do not directly implement, interpret, or prescribe law or policy with respect to the application of future rates, wages, or prices, the Commission concluded that views are not rules under the APA. *Id.* at 12.

The Commission reiterates its finding from Order No. 2960 that the Commission’s section 407 views are not rules under the APA. The Commission’s views are advisory, interagency communication as contemplated by 39 U.S.C. § 407(c). The purpose of the Commission’s procedural rules in 39 C.F.R. part 3017 is not to facilitate an adversarial proceeding or promote discovery, but to provide an opportunity for

⁷ *Id.* at 10-11. These steps include finalization of U.S. positions on UPU proposals consistent with the Commission’s views, unless the Secretary of State determines in writing to the Commission that foreign policy or national security reasons dictate otherwise; negotiation of proposals within the UPU; amendment of the UPU Acts to incorporate adopted proposals; and approval by the President or his or her delegate for ratification or accession. *Id.* at 11.

interested persons to participate in, and promote the transparency of, the development of Commission views. See 39 C.F.R. § 3017.2.

IV SPECIFIC DATA AND EXPLANATION REQUESTS

A. Inbound and Outbound Letter Post Data

Positions of the parties. FedEx asserts that commenters, at a minimum, need high-level summaries of the Postal Service's inbound and outbound volume, cost, and revenue data for each proposed terminal dues rate schedule or sub-schedule. Motion at 6-7. FedEx also requests other related data (illustrated in Tables 2 and 3 of the Motion); seeks historical data for a sufficient time period to facilitate its analysis over time; and asks that the provider of the data explain the data's source. *Id.* at 6-8. FedEx also asks that the Commission describe the factors it will consider in forecasting this data to the period during which the proposed terminal dues rates will be in effect. *Id.* at 6-7.

The Postal Service challenges FedEx's data request on several grounds. The Postal Service's primary objection relates to the commercial sensitivity of much of the requested data. Answer at 5. It asserts that data not in the public domain are commercially sensitive and their confidentiality should be protected. *Id.* The Postal Service also asserts that the threat of commercial harm is "especially pronounced" because of FedEx's status as "one of the Postal Service's leading commercial competitors." *Id.* The Postal Service also contests FedEx's characterization of the requested data as a "high level" summary and states that high-level aggregations of the requested data are publicly available. *Id.*

Commission analysis. FedEx's data request seeks the inputs that can be used to forecast the financial impact of changes in terminal dues. The requested data falls into several categories. The first category is requested data that are not filed with the Commission. For example, the Postal Service does not file a country-specific breakdown of volumes and weights by shape (letters and flats versus small packets).

The second category is requested data that have been filed under seal due to its commercial sensitivity in other Commission proceedings.⁸ Specifically, the Postal Service files volume and weight data by surface and air, and by target and transition system, in a non-public version of its quarterly Revenue, Pieces, and Weight (RPW) report. The Postal Service also files disaggregated volume and weight data by country and transportation method in the International Cost and Revenue Analysis under seal in the Annual Compliance Report. The third category is data that are publicly available. Specifically, the Postal Service files volume and weight data in the public version of its RPW report at a more aggregated level than sought by FedEx.⁹

The Commission declines to compel the Postal Service to disclose the data requested by FedEx that is not currently publicly available because, as discussed in Section III, this docket is intended to increase transparency and provide interested members of the public the opportunity to comment on the general direction of the Commission's views under section 407 and on specific proposals, when posted. Dockets opened under 39 C.F.R. part 3017 are unique and discovery is not permitted by interested parties under those regulations. The Postal Service may elect to file comments in this docket, but it is not required to participate pursuant to 39 U.S.C. § 407 or the Commission's rules.

Other available data and information. There are also other publicly available resources concerning the UPU more generally and terminal dues in particular. The Postal Accountability and Enhancement Act of 2006 created a Federal Advisory Committee for International Postal and Delivery Services (IPoDS). See 39 U.S.C. § 407(b)(3). Headed by the Department of State, the IPoDS meets several times per year, and generally includes updates and presentations on key issues under development in the UPU. Meetings of the IPoDS are announced in advance in the

⁸ Data in this category can only be disclosed through the procedures of 39 C.F.R. part 3007. FedEx has not sought disclosure of the requested data pursuant to that part.

⁹ The most recent public version of the Postal Service's quarterly RPW report is available on the Commission's website at <http://www.prc.gov/dockets/document/95874>.

Federal Register and are open to the general public. The IPoDS has a Terminal Dues Working Group that provides recommendations to the Department of State on terminal dues negotiations in the UPU.

In addition, the UPU website has a tool for forecasting the financial impact of the terminal dues proposals, Impact Tool (VI of the 2018-2021 cycle), and related Instructions.¹⁰ This tool, which contains hypothetical data, was developed to allow postal operators to estimate the financial impact of the terminal dues proposals by inputting country-specific data. For the public, this tool identifies the proposed changes in the terminal dues system, contains the methodology and technical parameters for determining the rates, and allows for exploration of the impact of the terminal dues proposals by either using the hypothetical data provided or inputting other data. The Commission will include the link to the Impact Tool and the Instructions in the Notice of Filing Documents, filed contemporaneously with this Order.

B. Discussion of Section 3622(b) and (c) Objectives and Factors

Positions of the parties. Likening this docket to a proceeding under 39 U.S.C. § 3622, FedEx suggests that the Postal Service or the Department of State should be considered the "proposer" of the terminal dues rates in this docket. Motion at 8-9. Consequently, it requests that the Commission require a filing that discusses "how the planned rate adjustments are designed to help achieve the objectives listed in 39 U.S.C. [§] 3622(b) and properly take into account the factors listed in 39 U.S.C. [§] 3622(c)." *Id.* at 8. FedEx contends that such a filing is "an essential component of a reasoned discussion of proposed rates." *Id.*

The Postal Service contends that FedEx's suggestion conflicts with Order No. 2960, in which the Commission described dockets under 39 C.F.R. part 3017 as non-adversarial. Answer at 7-8. The Postal Service also contends that FedEx's

¹⁰ The Instructions provide a brief description of the methodology, the assumptions used in the Impact Tool, and a brief description of how to interpret the results.

request would create a two-step procedure by which the Postal Service would be required to file first, allowing FedEx and other commenters to file “reply comments” in response. *Id.* at 8. The Postal Service asserts that this would directly conflict with Order No. 2960’s determination that reply comments would not generally be permitted in dockets under 39 C.F.R. part 3017. *Id.* at 7-8.

Commission analysis. In likening this docket to proceedings under 39 U.S.C. § 3622 and requesting that the Postal Service or the Department of State be required to provide a narrative discussion supporting the proposals, the Motion misconstrues the scope and intent of this docket. In Order No. 2960, the Commission explained that 39 U.S.C § 407 “makes clear that Commission views are an interagency advisory communication prepared at the request, and for the sole consideration of, the Secretary of State.” Order No. 2960 at 10. In addition, 39 C.F.R. § 3017.2 makes clear that the purpose of the 39 C.F.R. part 3010 is “to facilitate public participation in, and promote the transparency of, the development of Commission views.” 39 C.F.R. § 3017.2. Given the unique scope and purpose of this docket, neither the Postal Service nor the Department of State is obligated to participate as neither 39 U.S.C. § 407 nor 39 C.F.R. part 3017 impose a burden of proof or burden of production on any party. Comparisons to market dominant rate proceedings are inapposite as those proceedings are governed by 39 U.S.C. § 3622 and 39 C.F.R. part 3010, where the Postal Service bears the burden of proof and different statutory and regulatory standards apply.

C. UPU Documents

Positions of the parties. FedEx seeks access to five UPU documents (Proposal 1, Document 15, Document 40, Article 12, and Proposal 20.12.91). Motion at 9-10. FedEx maintains that the requested documents are necessary for a better understanding of the proposals that the Commission posted on its website. *Id.* The Postal Service states that to the extent the Commission is able to post UPU proposals, it should limit them to those that are relevant to this proceeding. Answer at 3, n.5. It

asserts that any UPU proposal that would not establish a rate or classification for a market dominant product is beyond the scope of this proceeding. *Id.*

Commission analysis. The following table describes the five documents requested by FedEx.

Table 1
Summary of Requested UPU Documents

UPU Document	Description/Content
Proposal 1 General Revision of the Universal Postal Convention	Proposal 1 seeks the adoption by the UPU Congress of the final draft of the revised Universal Postal Convention (recast Convention) ¹¹ as the basis for its deliberations of proposals before the UPU Congress. The recast Convention is contained in Document 15.
Document 15 Recast of the Universal Postal Convention and Regulations	Document 15 contains the full text of the recast Convention. If adopted, it would serve as the basis for the UPU Congress's deliberations of proposals. It also includes an explanation of changes from the 2012 Convention and the background for these changes.
Document 40 UPU terminal dues system for the 2018-2021 period	Document 40 provides an explanation of the changes to the terminal dues provisions of the UPU Convention in proposals 20.27.1, 20.28.1, and 20.29.1. It includes the methodology for establishing rates by country group and the countries in these groups.
Article 12 Posting abroad of letter-post items	Article 12 is the same as Article 28 in the current Convention. It sets out the conditions under which designated postal operators must forward and deliver inbound international letter post items based upon the nationality of the sender, country of posting, and mail volume. It also establishes the conditions under which a designated postal operator may require payment of domestic rates in lieu of terminal dues.
Proposal 20.12.91 Use of UPU forms	Proposal 20.12.91 establishes a new article in the Convention that provides that only designated postal operators can use UPU forms and documentation for the operation of postal services and the exchange of postal items under the UPU Acts. It also indicates that the use of these forms and documentation is subject to the national legislation and policy of the UPU member country or territory in which the designated postal operator is providing postal services.

In Order No. 2960, the Commission stated that it only gives views on proposals establishing a market dominant rate or classification. Order No. 2960 at 20. The definition of views in 39 C.F.R. § 3017.1(b) further explains that views are “the opinion

¹¹ The recast Convention serves as the basis for all UPU Congress proposals. It is a revised version of the 2012 Universal Postal Convention currently in place and contains the same provisions as the 2012 Convention, except that they have been reorganized and streamlined.

the Commission provides to the Secretary of State pursuant to 39 U.S.C. § 407(c)(1) on the consistency with modern rate regulation of a proposed treaty, convention, or amendment that establishes a market dominant rate or classification.” 39 C.F.R. § 3017.1(b). As discussed below, specific articles of the recast Convention in Document 15 and Document 40 in its entirety give context to proposals establishing market dominant rates or classifications. As a result, those documents will be posted in Docket No. IM2016-1 contemporaneously with this Order.

Document 15. Certain articles of the recast Convention¹² contained in Document 15 are necessary to provide context to the proposals establishing market dominant rates and classifications that the Commission posted on its website. In some of these proposals, amended articles are not reprinted in their entireties. Instead, paragraphs in articles that are left unchanged are marked as unchanged and paragraphs deleted in their entireties are marked as deleted. The proposals do not contain the unchanged or deleted language. Therefore, having access to the Convention has generally created a direct link between proposals and the original articles containing the unchanged and deleted paragraphs. However, for this UPU Congress, all proposals reference the article number in the recast Convention, which is contained in Document 15, and may be different from the article number in the publicly available 2012 Convention. As a result, the Commission concludes that certain articles of the recast Convention provide necessary context for commenters to evaluate relevant proposals. Consequently, the Commission will make the portions of Document 15 applicable to the proposals it has posted on its website publicly available, and will post those portions of Document 15 on its website via a contemporaneous Secretary's Notice.¹³

Document 40. Document 40 provides further context and explanatory background information on proposals 20.27.1, 20.28.1, and 20.29.1, which amend the terminal dues provisions of the UPU Convention. Therefore, the Commission finds Document 40 is directly applicable to proposals establishing rates or classifications for

¹² Articles 1, 16, 27, 28, and 29.

¹³ See Notice of Posting of Documents, July 14, 2016, Attachment B (Notice).

market dominant products. The Commission will make Document 40 publicly available on its website via a contemporaneous Secretary's Notice. See Notice, Attachment B.

Proposal 1. The Commission concludes that this proposal is not related to market dominant rates and classifications because it serves primarily as an administrative mechanism for adopting the recast Convention contained in Document 15. Accordingly, the Commission declines FedEx's request to make Proposal 1 publicly available.

Article 12. The Commission concludes the proposal concerning Article 12 of the Convention does not establish market dominant rates and classifications and, therefore, falls outside the scope of the Commission's views under section 407. Consequently, the Commission declines to make Article 12 publicly available.

Proposal 20.12.91. This proposal concerns the use of UPU forms. As this proposal does not establish a market dominant rate or classification, the Commission declines to post Proposal 20.12.91.

It is ordered:

The Commission grants, in part, the Motion of Federal Express Corporation Requesting Appropriate Data and Explanations, filed June 16, 2016, as described in the body of this Order.

By the Commission.

Ruth Ann Abrams
Acting Secretary